Neutral Citation Number: [2022] CA (Bda) 11 Civ

Case No: Civ/2021/10

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2019: No. 065

Sessions House
Hamilton, Bermuda HM 12

Date: 17/06/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

- -

Between:

DETECTIVE SERGEANT DAVID BHAGWAN

Appellant

- and -

(1) STEPHEN CORBISHLEY (COMMISSIONER OF THE BERMUDA POLICE SERVICE (BPS))
(2) MARTIN WEEKS (ASST. COMMISSIONER OF POLICE, INTERVIEW PANEL CHAIRMAN),
(3) ANTOINE DANIELS (ASST. COMMISSIONER OF POLICE, INTERVIEW PANEL MEMBER),
(4) MICHAEL TROTT (BPS HUMAN RESOURCE MANAGER, INTERVIEW PANEL MEMBER),
JOHN PAYNE (INTERVIEW PANEL MEMBER)

Respondents

Mr. Philip J Perinchief of PJP Consultants for the Appellant
Mr. Allan Doughty and Miss Safia Gardener of MJM Limited for the Respondents

Hearing date: 16 March 2022

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APPROVED JUDGMENT

SMELLIE JA:

1. The Appellant, Detective Sergeant David Bhagwan, appeals against the judgment of the Supreme Court of 26 April 2021 delivered by the learned Chief Justice in this matter ("the Judgment"). The Judgment dismissed the Appellant's application brought by way of judicial review by which he sought the following relief in relation to the results of the Bermuda Police Service ("**BPS**") 2018 Sergeant to Inspector Promotion Process (**"the 2018 Promotion Process"**):

   (1) An order of certiorari quashing the decision and the results of the BPS 2018 Sergeant to Inspector Interview Panel, dated 21 September 2018.

   (2) A declaration that the Commissioner of Police ("**the Commissione**r") and the Interview Panel ("**the Panel**") overreached their duties and acted unlawfully pursuant to the Police Act 1974 ("**the Act**") and the Police (Conditions of Service) Order 2002 ("**COSO 2002**") in relation to the 2018 promotions.

   (3) A declaration that the interview process of the 2018 Sergeant to Inspector Interview Panel was conducted with bias and was ultra vires.

   (4) An order of mandamus requiring the Respondents to comply with the provisions of the Act and COSO 2002 relating to promotion.

2. On the appeal against the Judgment, Mr Perinchief presented extensive arguments on behalf of the Appellant based upon a number of revised grounds of appeal. These, on the hearing of the appeal, were reduced to six grounds of criticism of the 2018 Promotion Process, summarized and argued as follows:

   i. The exclusion of Mr Trott and Mr Payne (the 4th and 5th Respondents) from the assessment of the "In-Basket Exercise" part of the Interview Panel process was illegal and procedurally unfair.

   ii. The exclusion of the Bermuda Police Association ("**BPA**") observer from the Interview Panel process was illegal and procedurally unfair.

   iii. The use of the Likert Scale calculations (for calculating the results of the Interview Panel process) was illegal and irrational.

   iv. Failure to apply the Professional Development Report ("**PDR**") policy when assessing the candidates for the 2018 Promotion Process was illegal and procedurally unfair.

   v. The exclusion of Assistant Commissioner of Police ("**ACOP**") Daniels (the 3rd Respondent) from the marking of the Appellant's "In-Basket Exercise" was illegal and a procedural irregularity which the Chief Justice failed to take into account.

   vi. The alleged non-attendance of Mr Payne (the 5th Respondent) at the Assessors' Workshop presented for training of assessors in December 2012 caused him to be unqualified to assess

the 2018 Promotion Process and therefore his involvement in the process was illegal and a procedural irregularity. And further, Chief Inspector Hashim Estwick's evidence about this should have been accepted by the Chief Justice but was not considered.

3. A further complaint – that of the alleged failure by the learned Chief Justice to apply proportionality principles in an attempt to balance and give effect to all interests concerned ; viz: the Appellant's, the other candidates to the 2018 Promotion Process and the public at large - was abandoned, and in our view, quite properly so. In this regard, having addressed all the other substantive factual allegations made by the Appellant, the learned Chief Justice concluded at [108] of the Judgment, on the issue of proportionality: "*I do not consider that a freestanding reliance upon the principle of proportionality has any relevance to the facts of this case or the complaints made by (the Appellant)"*. On the facts of this case, that was an entirely proper conclusion.

4. In essence, as set out above, the Appellant's complaints on the appeal are about alleged illegality, procedural irregularity and unfairness of the 2018 Promotion Process, and in particular, the conduct of the interview by the Panel.

5. However, as set out above in the third head of relief from his Notice of Application, before the Supreme Court the Appellant also sought to challenge the results by a specific allegation that the conduct of the Panel had been tainted by bias on the part of ACOP Martin Weeks, the second Respondent and one of two officers who co-chaired the Panel. While that ground was not relied upon before this Court, given the sensitivities of the issues raised in the Appellant's reliance upon it before the Supreme Court, it is worthwhile explaining why we consider that the learned Chief Justice's rejection of it was correct and why we consider the Appellant's abandonment of it as a ground of appeal, to have been appropriate.

6. The Appellant, who had served altogether in excess of 20 years as an officer of the BPS with the latter 11 years as a Sergeant, applied as a candidate but was not selected by the Panel for consideration for promotion to Inspector, following the 2018 Sergeant to Inspector interview process. He was advised by letter dated 21 September 2018 that his final score was calculated at 55.48%, whereas the passing grade was 60%. For reasons explained below, his score was later corrected to 56.68% but as that score also failed to meet the passing grade, it did not change the final outcome.

7. The Appellant argued before the Supreme Court that given the alleged history between ACOP Weeks and himself ACOP Weeks, on the ground of "*personal biases (real, apparent or imagined) against this applicant personally, and against Caribbean officers generally*" should have recused himself from the Panel. Widely cast though it appeared, as the Judgment records at [46], it was explained that this allegation of bias against ACOP Weeks was meant to be one not of actual but of *apparent* bias. So far as the allegation involved the relationship between the Appellant and ACOP Weeks, it was moreover, sought to be substantiated only by reference to a written assessment which ACOP Weeks had provided to the Commissioner of Police in September 2007, of the Appellant's suitability then to have been confirmed for promotion to the rank of Sergeant. For the reasons detailed in that written assessment, ACOP Weeks then recommended that the Appellant not be confirmed as Sergeant until he had undergone a probationary period of supervision and mentoring by a senior Sergeant and an Inspector, whilst on shift duty. Those recommendations on their face provided sound reasons for the requirement of a period of

probationary supervision and they were in fact accepted and implemented, before the Appellant was confirmed as Sergeant.

8. So far as the allegation of bias against ACOP Weeks related to "*Caribbean officers generally*"; in the Court below, the Appellant relied upon the 2013 Sergeant to Inspector promotion process of which ACOP Weeks had also been the chairman and alleged that he had influenced the selection of five United Kingdom officers but only allowed two Caribbean officers to progress to the extended selection process. The Appellant also alleged that in 2015, when the BPS was challenged with austerity measures to reduce operating costs, ACOP Weeks prepared the list advising which BPS service officers' contracts should not be renewed and that in so doing, he discriminately listed low value to several Caribbean officers whose contracts were up for renewal.

9. However, as the learned Chief Justice records at [52]-[63] of the Judgment, there were readily apparent reasons why these allegations of bias were unsustainable. For instance, as regards the 2013 Process, the unchallenged evidence of ACOP Weeks was that the scores and results had been overseen not by himself but by DCOP Paul Wright, ratified by the Commissioner and signed off by the Public Service Commission (**"the PSC"**).

10. Further, as to the factual unsustainability of the allegations, the evidence revealed that in the 2018 Process co-chaired by ACOP Weeks, of the 11 officers who were successful, the ethnic and national composition was as follows: West Indian Officers 1 (passed in 2nd place), British 2 (passed in 8th and 9th place), white Bermudian 1 (passed in 7th place) and all of the other 7 successful candidates were black Bermudians. There were 6 West Indian officers who were unsuccessful (including the Appellant). Moreover, in the 2018 Constable to Sergeant Process, out of the 24 candidates who were successful, 13 were West Indian (ie: Caribbean).

11. In relation to the list drawn up as part of the austerity measures, as the Judgment records and contrary to the Appellant's assertions, the list was drawn up by the Commissioner's Staff Officer (Constable Julie Gardner) at the Commissioner's request using language directed, so far as ACOP Weeks was aware, by then DCOP Jackman, a West Indian officer. The "*high value/low value*" criteria listed against respective officers was, according to ACOP Weeks, rightly criticized in court. Further, ACOP Weeks averred that he was not the author of the list but was instructed to tick boxes against names by the then Commissioner, using the system he had authorized.

12. It was against that summary of the factual circumstances of the allegations, that the Judgment adopted and applied the relevant test to be applied in a case where an issue of appearance of bias is raised - the test as most recently explained by this Court in *Athene Holdings Limited v Iram Siddiqui and Others* [2019] SC (Bda) 20 Com (15 March 2019) following *Porter v Magill* [2002] 2 AC 357 and *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416. Concisely stated, the test for apparent bias is whether the fair-minded and informer observer, having considered the facts, would conclude that there was a real possibility that the arbiter, tribunal or judge was biased. The conclusion in the Judgment that the test was not met by the Appellant's allegations is, in our view, on the facts described, unimpeachable.

13. Moreover, as the Judgment explains at [60] to [65], the allegations of appearance of bias in this case must be considered to have been waived by the Appellant. It was common ground that the names of the individuals appointed as Assessors for the 2018 Process (including that of ACOP

Weeks as the co-chairman) were advertised well in advance. Any candidate, including the Appellant, who had wished to object to any member of the Panel had ample time to do so, if concerned about appearance of bias. The Appellant had raised no such concern and as the Judgment notes at [60], appears to have simply reserved his position in this regard until he saw how the decision went.

14. And while he raised for the first time and very belatedly in his First Affidavit filed in these proceedings on 15 February 2019, the allegation of appearance of bias based upon the list prepared showing "*high value/low value*" criteria, this is a concern of which he would have been aware arising from events 6 years earlier in 2013 and so should have been raised as a ground for disqualification before participating in the 2018 Process with ACOP Weeks as co-chairman. Likewise, the alleged longstanding concerns arising from the recommendation made by ACOP Weeks in his assessment report in September 2007 in relation to the Appellant's promotion to Sergeant. Any genuine apprehensions held by the Appellant about bias on the part of ACOP Weeks, would surely have been recalled when the names of the Assessors for the 2018 Process were advertised.

15. The case law makes it clear that in cases of allegations of appearance of bias, a complainant, who has knowledge of the facts said to give rise to appearance of bias, is required to make the necessary objection at the earliest opportunity. If he does not object and allows the tribunal to render a decision, he will be deemed to have waived any objection on ground of appearance of bias. See, for instance, *R v Secretary of State for Home Department, ex parte Al-Fayed* [2001] Imm AR 134 and *Amjad and Others v Steadman-Byrne* [2007] 1 WLR 2484. In this latter case, Sedley LJ declared that appellate and reviewing courts "*tend not to look favourably on complaints of vitiating bias made only after the claimant has taken his chance on the outcome and found it unwelcome."*

16. Accordingly, as noted above, the ground of appearance of bias is one which must be regarded as having been properly abandoned.

17. Before turning to deal with the six grounds of appeal upon which the Appellant did rely (as set out above), it is necessary to describe in a bit more detail the policy and process for promotions within the BPS.

18. There is also a preliminary issue to be addressed relating to the jurisdiction of the Court. It is whether decisions taken in the process of police promotions are subject to judicial review. This issue was also addressed in the Judgment such that we need only express brief reasons in agreement with the Chief Justice's positive finding of jurisdiction. This too will be done before turning to the substantive analysis of fact, examining the six grounds of appeal, taken in turn.

The Background

19. ACOP Weeks, as explained by him in his affidavit evidence before the Supreme Court, had been appointed by the Commissioner to lead the reform of the BPS Promotion Policy ("**the 2018 Policy** or **the Policy**") and of the Promotion Process in 2017 and this reform resulted in the 2018 Policy and the Process which the Panel was required to apply. While, as discussed above, the specific ground of complaint of apparent bias was not pursued on the appeal, before the Supreme Court and still before this Court, certain criticisms were sought to be made of ACOP Weeks' involvement

in the 2018 Process on the basis that he was responsible for various of the other irregularities cited. On his application for judicial review, the Appellant had therefore invited the Supreme Court to undertake a detailed examination of the Policy and of the Process for the conduct of interviews and, as reflected in the Judgment, such an examination was indeed undertaken.

20. It will therefore suffice for us to adopt here, the summary description of the history of the Policy and the Process given in the Judgment.

Promotions within the BPS

21. In common with other Police organizations, the BPS operates a structured promotion policy within its ranks of officers. The Policy is a document which has been revised on a periodical basis. In recent years the Policy has been revised following consultation at all levels of the BPS, including the BPA.

22. There exists no entitlement to promotion within the BPS and the members are not automatically promoted in any circumstances. Promotions are made based on merit and operational needs and always subject to the decision of the Commissioner. The Policy does not guarantee promotion. Passing any part or indeed the whole of the process simply provides an applicant with the opportunity to then be considered for promotion by the Commissioner. In all cases, promotion is at the discretion of the Commissioner and in the case of the ranks of Inspector and Chief Inspector, only after the Commissioner's recommendation to the PSC and the PSC's subsequent approval. This lack of entitlement is reinforced at every stage of the Process to ensure that all expectations are properly contained.

23. The earlier Process and Policy, such as that followed in 2013 **("the 2013 Process")**, was radically different from that adopted for the 2018 promotions in that it had provided for a very strict drawn-out process, designed to 'filter out' as many candidates as possible in order to limit the amount of formal interviews to be conducted. The earlier process for each rank promotion had an application form which had multiple questions to answer as well as a career summary document to prepare. All candidates were marked and many were '*failed*' on the answers they gave to the questions. Moreover, the applicants had to submit two Performance and Development Reviews documents (ie: the PDRs), completed pursuant to the Performance and Development Review Policy ("**the PDR Policy**"), an administrative database into which all officers were required to make regular ongoing entries as to the conduct of their duties. These PDRs were then screened by the Assessment Panel and where entries were not deemed strong enough the candidates were rejected, *in limine.* The intention then was to have a maximum of 10 candidates in each rank progressed through to the Interview stage.

24. Following the 2013 Process, all applicants had been invited along with the BPA to submit written feedback and that feedback proved to be highly critical of the fairness of the 2013 Process.

25. ACOP Weeks explained that when, as a consequence, it was suggested in 2017 that a revised Process needed to be established, he volunteered to take the lead in its re-promulgation. He took the written feedback from the 2013 Process and invited volunteers from across the BPS to form a working group **("the Working Group")** to refine the Policy and present a revised Policy to the Commissioner.

26. The Working Group was formed with membership across the ranks from Constable to Chief Inspector, as well as representatives from the BPA. The Appellant volunteered for membership and was made a member of the Working Group.

27. The feedback from the Working Group was that the 2013 Process was unduly time-consuming and that a number of candidates felt it unfair that their PDRs, although having been signed off by the supervisors, were found not to be strong enough for them to continue in the 2013 Process. The Working Group proposed a new Policy to the Commissioner. The Commissioner directed that the new Policy be as "*inclusive*" as possible and not designed to "*exclude*" candidates like the previous one had. To that end, the Commissioner directed the following changes:

    (a) Removal of the lengthy questions from the Application Form, leaving only the requirement to complete all sections (including the Career Summary and details of professional development undertaken by candidates at their own volition).

    (b) Removal of the requirement for PDRs to be graded by the Interview Panel. However, the Commissioner declined to remove the PDR requirement completely but did agree to only require an applicant to attach the two completed PDRs for the last two (2) years. The Commissioner agreed that the applicants would not be marked down on the contents of PDRs and that they must instead prove compliance with the PDR Policy by having completed one each year.

28. The result of this was that there was no limit on the number of candidates who could go through to the interview stage and so, over the course of the next year, the Interview Panel interviewed 80 candidates across the various ranks. This was done to ensure that all who successfully completed the application process received a fair chance to a face-to-face interview, the absence of which chance was a big criticism of the previous policy.

29. ACOP Weeks emphasized that the Appellant, through his participation on the Working Group, was instrumental in the development and formulation of the 2018 Promotion Policy of which he either now claims ignorance or otherwise criticizes in a number of ways to be discussed below, in bringing these proceedings. He was and is, contends ACOP Weeks, fully conversant with exactly how it works.

The 2018 Promotion Process

30. In order to assess the Appellant's arguments on his grounds of appeal, it is necessary to set out the relevant provisions from the 2018 Policy. It is, like earlier iterations, a policy promulgated by the Commissioner as part of the statutory framework for the governance of the BPS as set out in the Act. In this regard, in providing for the constitution and administration of the BPS as a disciplined service, section 3(1) of the Act declares that the BPS "*shall be under the command of the Commissioner, who, subject only to such general directions of policy with respect to the maintenance of public safety and public order as the Governor may give him, shall determine the use and control the operations of the Service, and shall be responsible subject to such directions as the Governor may give him, for the administration of the Service.*"

31. In furtherance of section 3(1), section 32 (1) of the Act provides that the Governor may by Order provide for the better carrying out of the Act and the general government and discipline of the Service and, without derogation from the generality of this provision, any such order may relate to, among several other matters, at paragraph *(g) "conditions, conduct or performance of service …"*.

32. It was pursuant to this section 32(1) power that the Governor made COSO 2002, Order 20 of which deals with the subject-matter of promotion within the BPS and provides:

> "**20. <u>Promotion</u>**
> *20.1 Promotions are made on merit. There are opportunities for members of the right calibre to be advanced eventually to the higher (gazetted) ranks.*
>
> *20.2 The Commissioner of Police will seek the input of the Bermuda Police Association when any changes to the promotion process policy for the ranks of Chief Inspector and below is under consideration.*
>
> *20.3 The Commissioner of Police will permit a Bermuda Police Association "observer" position at the interview stage of the promotion process for the ranks of Chief Inspector and below.*"

33. The 2018 Policy, summarized below, is as it became following amendment in October 2017 upon adoption of the Working Group's recommendations under the oversight of ACOP Weeks and pursuant to the Commissioner's directions:

> *(a) It shall be the policy of the BPS to maintain standardized procedures pertaining to promotions. Under the guidelines of the Policy, the promotion process will be fair and transparent and will result in the appointment of individuals who best demonstrate the prerequisite skills, knowledge and abilities necessary for the BPS to achieve its overall mission, goals and objectives (paragraph 2.1)*
>
> *(b) The BPS will conduct all examinations and interviews for promotions of police officers within the Service. The only external involvement in the process, would be by the roles played by the PSC and the Governor. The Commissioner will make all promotion appointments to the rank of Sergeant. The promotions for ranks above Sergeant will be upon the recommendation of the Commissioner to the PSC and with the final ratification from the Governor. The BPS may utilize a person from outside the Service as assessors or role players during the Process (paragraphs 2.2 and 2.3).*
>
> *(c) The Commissioner is responsible for the overall administration of the Process within the Service. Any changes to the Process for the ranks of Sergeant to Superintendent will be made after consultation with the BPA in accordance with COSO 2002 (paragraph 4.1).*
>
> *(d) The BPS will utilize an extended promotion process to ensure that the most appropriate component is used to measure the various competencies that have*

been identified as part of the Process. For promotion to the ranks of Sergeant and Inspector, the extended promotion process will include (i) knowledge examination, which involves multiple choice examination used to assess the candidates' knowledge of law, policy and procedures; (ii) review of Promotion Process Application Form; (iii) Structured Interview for which questions will be provided to the candidate two hours in advance of the interview to provide time to prepare and will include one Presentation Question; and (iv) "In-Basket" problem-solving exercise, where the candidate assumes the role of the next rank and is directed to respond to a predecessor's in-basket items in writing (paragraph 6.1 and 6.2).

(e) To achieve a degree of consistency and ability, a group of assessors will be identified and trained to effectively assess an extended promotion process. Assessors from within the BPS will be of a higher rank than the candidate. To demonstrate objectivity and to promote transparency, one of the assessors will be a known BPS member. Assessment Panels will consist of at least two senior police officers, a Human Resource professional, and one non-BPS member in order to provide a rich assessment base. Only suitably trained persons may participate in the role of an assessor. All examination papers will be marked independently by at least two assessors to ensure accuracy of marking. Exam papers will utilise candidate coding to ensure that assessors are unaware of which candidate completed the paper. On the written application, candidates may request that a BPA representative may be present during the Structured Interview (paragraphs 8.1, 8.2, 8.3, 8.4, 9.6 and 13.8).

(f) Candidates will be scored for each component of the extended promotion process. These scores will be prorated as a percentage. Candidates must achieve an overall passing rate of 60%. Candidates who successfully passed the promotion process will be rank ordered based on their overall scores. They would be eligible for promotion for a period of four years. Passing the Process and being deemed eligible for promotion does not guarantee that the candidate will be promoted within the period of eligibility. Where a candidate is not promoted during the period of eligibility, the Process must be retaken with the exception of the knowledge-based examination (paragraphs 11.1 to 11.4).

(g) Candidates who do not pass the Process will have the opportunity to repeat the process during the next promotion period (paragraph 13.7).

(h) In the interest of fairness and transparency, candidates may appeal their scores related to their performance in the Process. Candidates would be allowed 14 days to appeal from the date of the notification. Appeals concerning scores by assessors for the extended process components (not examinations) may be made where the candidate perceives that there has been bias or errors in process. Candidates have the right to use the Service's established grievance procedure for an appeal when applicable (paragraph 14.1, 14.2, 14.3 and 14.6).

(i) The Inspector, Training & Development, is responsible for the safekeeping of all

test materials, rating forms, interview binders, and all other relevant documents to the Inspector level (paragraph 15.1).

34. As already noted, the Appellant participated in the 2018 Promotion Process. Also as already noted, the Panel was co-chaired by ACOP Weeks. ACOP Antoine Daniels, the second Respondent, was the other senior officer member of the Panel, as required by the Policy. ACOP Weeks testified that ACOP Daniels served as co-chair of the Panel. Mr Michael Trott, the BPS Human Resource Manager, also as required by the Policy, was the third member and the fourth, Mr John Payne the 5th Respondent, occupied that place on the Panel reserved for a non-BPS person, for sake of transparency and "*to provide a rich assessment base*", also as required by the Policy.

35. The Appellant was advised by the letter of 21 September 2018 (co-signed by ACOP Weeks and ACOP Daniels) that he had not achieved the minimum passing grade of 60%. The Appellant was advised that his scores (rounded up to the nearest .5 point) were broken down as follows:

Application Form (maximum 5%)	3.5%
Presentation (maximum 25%)	11.5%
Structured Interview (maximum 50%)	32.5%
In Basket Exercise (maximum 20%)	8.5%
TOTAL SCORE	**55%**

36. The Appellant had pointed out that there was in fact an arithmetical error in that the total score as shown above, when added up, should be 56% and not 55%. This was accepted by the Panel and a revised letter showing the total score as 56.68% was issued on 2 October 2018. Further, as the Judgment notes at [85], the score was later "rounded up" in response to the PSC's refusal to accept scores recorded in fractions, insisting instead that they be expressed in whole numbers. Thus, the four components of the final actual scores were "rounded up" from a total of 56.68% to 58% and so still below the passing grade.

37. Under the section *"Comments from the Assessors"*, the Appellant was advised that the Panel was impressed with his Application Form that highlighted clear and strong links between the examples that he cited and the relevant behaviors. The Panel also took note of his track record in relation to self-initiated development – he had voluntarily undertaken study towards a bachelor of laws degree.

38. It was also noted that his presentation showed a good understanding of the key performance indicators of the Community Confidence. However, his use of the Service Decision Model could have been more effective as some Panel members were confused by the structure of the presentation. The Panel advised that his performance would have been enhanced by stronger examples of Problem Solving and Team Working.

39. The Panel considered that his performance in the Structured Interview section was strong with an above average score in the area of Professional Ethical Conduct and good scores in other competencies.

40. The Panel noted that there were some areas that required development in the "In-Basket Exercise" which had a negative impact on his final scores. However, the Panel considered that Problem Solving and Leadership and Management were his strong areas.

Jurisdiction

41. As already noted, the Process and the decision of the Panel were challenged by the Appellant by way of judicial review, on the grounds of illegality, irrationality, procedural impropriety and lack of compliance with the proportionality principle (the proportionality argument having been abandoned on appeal).

42. Pursuant to section 64 of the Supreme Court Act 1905 and Order 53 of the Rules of the Supreme Court, the Appellant had been granted leave to apply for judicial review. In the words of section 64(2), "*leave may only be granted if the Court considers that the applicant has a sufficient interest in the matter to which the application relates*."

That "matter" was of course, the Process, in respect of which the Appellant had been found by the Panel not to have attained the minimum passing grade of 60%. And, as the learned Chief Justice records at [34] of the Judgment "*the complaint made by [the Appellant] is not merely confined to the decision of the Panel to give him a failing grade for eligibility for promotion to Inspector, but challenges the entire 2018 Policy put in place to regulate promotion within the entire Service. As a result of this challenge [the Appellant] obtained from Bell AJ (an) Order on 4 April 2019 that "the decision of the Inspector Panel is stayed until further order"*

43. However, as the learned Chief Justice also records at [24] of the Judgment, Mr Doughty on behalf of the Respondents took a preliminary point by which he argued that the Court should not have granted leave to issue judicial review proceedings on the basis, among two other arguments (neither of which found favour with the Court and which need not be further considered here) that the decision of the Panel is, on its face, *operational* in nature and is not properly the subject of judicial review. Thus, notwithstanding the personal interest of the Appellant in the results of the Panel and the wider implications of his challenge to the entire Process, the issue arose for decision whether judicial review is an appropriate and available remedy in relation to promotions within the BPS.

44. At [36] of the Judgment, the learned Chief Justice expressed his conclusions on this issue in these terms:

> "*The present action as framed does not merely affect DS Bhagwan but affects all the officers who participated in the promotion process...the action seeks to challenge the 2018 Policy, promulgated for the purposes of discharging the [Commissioner's] statutory duties under section 3(1) of the [Act]. Given that the decisions made by the Panel, which are the subject of this challenge, affect the validity of the 2018 Policy and affect the Service as a whole, those decisions, in my judgment, do raise public law issues which as such are amenable to judicial review."*

45. While the Respondents have not sought to challenge the Judgment's conclusion on jurisdiction before this Court, given the importance of the issue, it is appropriate to explain why we consider that the conclusion is correct and should be upheld.

46. It is clear from section 3(1) of the Act that the Commissioner has a statutory responsibility for the administration of the BPS and this necessarily includes promotions within the ranks. Order 20 of COSO 2002 recognizes this statutory responsibility and gives effect to it by establishing a promotion policy for the ranks of Chief Inspector and below with the input of the BPA. Accordingly, the 2018 Promotion Process is to be regarded as established for the purposes of discharging the Commissioner's statutory duties under section 3(1) of the Act and the question is therefore whether the carrying out of those statutory duties is subject to judicial review.

47. As already mentioned, in arguing to the contrary Mr Doughty sought to describe the 2018 Promotion Process as operational in nature and so not subject to judicial review. He relied primarily upon a trilogy of cases, all of which happened to have been written by the same distinguished judge and the last of which, in his capacity as a Justice of Appeal of this Court.

48. In *Regina (ex parte Morgan) v Chief Constable of South Wales* [2001] EWHC Admin 262, Scott Baker J (as he then was)[1], considered the application by a police inspector for judicial review of the Chief Constable's decision to withdraw his qualification for promotion to chief inspector (termed his "white ticket"). The white ticket had been earned following an extended interview process, comparable to that involved in the 2018 Process in this case. The Chief Constable had decided to withdraw the applicant's white ticket because he had concluded that he lacked judgment, as demonstrated by his failure properly to supervise an investigation into gang race-related incidents.

49. The applicant's first ground of complaint was that the withdrawal of his white ticket was either a disciplinary sanction following his conduct in relation to the investigation or was something akin to it. The application had not, however, as a matter of fact, proceeded under the Police (Discipline) Regulations 1985. Indeed, while those regulations set out a comprehensive range of punishments (viz: dismissal, resignation, reduction in rank, fine, reprimand and caution), notably admonishment and advice, the measures applied in his case by the Chief Constable, were not among them.

50. Nevertheless, the applicant argued that what happened was in all but name a disciplinary proceeding and that what the Chief Constable had done was to punish him. His ability to prove himself for promotion had been withdrawn by the Chief Constable as absent a white ticket, he could not be promoted. Natural justice required that he should have been given a fair hearing of the kind required by disciplinary proceedings, which he had not been given. He was therefore entitled to seek redress by way of judicial review.

51. Scott Baker J disagreed, holding at [19] that:

> "*…Furthermore, the decision under challenge in the present case is one of a kind with which the courts should in my judgment only in the most exceptional circumstances, if ever, interfere. It is quite erroneous to look at the decision as one relating to discipline;*

[1] Mistakenly referred to as Lord Justice of Appeal at [29] of the Judgment.

it was a question of suitability for promotion. I am quite unpersuaded by the first limb of Mr Eicke's argument. The removal of the Claimant's white ticket was neither a disciplinary sanction nor anything akin to it. The Chief Constable did not act in a procedurally unfair way and he was not required to follow the procedure laid down within the Police (Discipline) Regulations".

52. It will be noted that the learned judge, while regarding the decision under challenge as of a kind amenable to judicial review "*only in the most exceptional circumstances*", implicitly recognized the existence of the jurisdiction.

53. Later, in *Regina (ex parte Tucker) v Director of National Crime Squad* [2003] EWCA Civ 57, and then as a Lord Justice of Appeal delivering the judgment on behalf of the Court, Scott Baker LJ, revisited his earlier decision from *Ex Parte Morgan*.

54. The appellant Tucker was a Detective Inspector in the Derbyshire Constabulary, which he joined in 1978. In 1996 he was seconded for five years to the Regional Crime Squad, which subsequently became the National Crime Squad ("NCS"). These postings with the NCS were highly sought after because the work was interesting and sensitive and postings regarded as being of "high status" within the service. In January 2001 Tucker's secondment was extended until May 2002, but on 28 April 2001 it was terminated and he was summarily returned to his local force. He had been telephoned at home by a member of the Professional Standards Unit at the NCS and told that a number of officers had been arrested at the Nottingham Branch for drug related matters in the course of investigations termed "Operation Lancelot". He was asked to go to the Derby Branch Office but not to discuss the matter with anyone. On arrival, he was told only that the Deputy Director of the NCS had, as a result of information provided to him, lost confidence in his management performance and that he was being returned to the Derbyshire Constabulary forthwith but without any disciplinary implications. He was handed a notice which said, in essence, that while the loss of confidence had nothing to do with the drug related incident involving other officers, it related to "*managerial issues in connection with your duties and conduct whilst a serving member of the National Crime Squad*." Tucker had asked for more information but was told that none could be given beyond that in the notice.

55. Tucker was aggrieved by the insensitive manner in which his secondment was terminated and the resulting association in the eyes of colleagues and others with serious allegations against other officers. The NCS had issued a press release which might have been more felicitously worded. He was, moreover, unable to answer the Deputy Director's concerns without being told the basis for them. In subsequent correspondence, it was accepted that secondment to the NCS was a high status posting and that it was possible his return to his force might have an impact on his career advancement. He had been confined to clerical duties with the Derbyshire Constabulary since his return in April 2001 and it remained to be seen whether, once the criminal proceedings brought in relation to Operation Lancelot were complete, the Director General would be able to be more forthcoming about the reasons for the termination of the secondment and what professional standards he had failed to maintain.

56. His claim in the High Court for judicial review of the decision summarily to terminate his secondment failed before Harrison J. on 12 April 2002. The Judge held that although the decision was amenable to judicial review the Director General of the NCS had acted fairly notwithstanding

the absence of reasons for the decision and the lack of opportunity for the appellant to make representations.

57. In the Court of Appeal, the first issue addressed was whether or not the decision of the Deputy Director General to revoke Tucker's secondment was amenable to judicial review. In delivering the judgment on behalf of the Court, Baker LJ acknowledged at [13] - [16], the difficulty posed by the issue, one which earlier cases discussed by him had also recognized:

> "*13. The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met. There are some cases that fall at or near the boundary where the court rather than saying the claim is not amenable to judicial review has expressed a reluctance to intervene in the absence of very exceptional circumstances. See e.g. R v British Broadcasting Corporation ex parte Lavelle [1983] 1All ER 241.*
>
> *14. The starting point, as it seems to me, is that there is no single test or criterion by which the question can be determined. Woolf L.J, as he then was, said in R v Derbyshire County Council ex parte Noble [1990] ICR 808, 814E:*
>
> > *"Unfortunately in my view there is no universal test which will be applicable to all circumstances which will indicate clearly and beyond peradventure as to when judicial review is or is not available. It is a situation where the courts have, over the years, by decision in individual cases, indicated the approximate divide between those cases which are appropriate to be dealt with judicial review and those cases which are suitabl(y) dealt with in ordinary civil proceedings."*
>
> *15. Sir John Donaldson MR in R v Panel on Take-overs and Mergers ex parte Datafin PLC [1987] QB 815, having referred to a number of different situations in which the court had asserted its jurisdiction, said at 838E:*
>
> > *"In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described are a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction*."
>
> *16. What are the crucial factors in the present case? In Leech v Deputy Governor of Parkhurst Prison [1988] AC 533 Lord Oliver of Aylmerton said that the susceptibility of a decision to the supervision of the courts must depend, in the ultimate analysis, upon the nature and consequences of the decision and not upon the personality or individual circumstances of the person called on to make the decision. I regard this as a particularly important matter to keep in mind in the present case".*

58. In his analysis, Baker LJ went on at [24] to adopt three criteria to be identified when considering whether a public body with statutory powers was exercising a public function amenable to judicial review or a private function that was not. These he described as having been helpfully set out by Pitchford J in *Hopley v Liverpool Health Authority & Others* (unreported) 30 July 2002, as follows:

> "*i) Whether the defendant was a public body exercising statutory powers;*
> *ii) Whether the function being performed in the exercise of those powers was a public or a private one; and*
> *iii) Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration*."

59. Adopting the guidance from the cases, and in particular those three criteria, Baker LJ determined that the decision in question fell on the operational rather than the disciplinary side of the dividing line and so was not amenable to judicial review, at [25] and [32]:

> "25. *Applying those criteria, with which I agree, to the present case it seems to me clear that the third criterion was not met. The Deputy Director General in sending the Appellant back to his force was not performing a public duty owed to him. The decision taken in relation to the Appellant was specific to him. Other officers were dealt with differently. Some were arrested; some were sent back to be disciplined; one was retained with different duties. But the Appellant was simply sent back. It was a decision tailor-made to him. It was taken because of perceived deficiencies in his skills and conduct as an NCS officer. It was an operational decision taken because it was decided that he fell short of the particular requirements that were necessary to work in the NCS. It had nothing to do with his private life and I reject Mr Westgate's contention that Article 8 of the ECHR was engaged."*

> *"32. In contradistinction to the decision with regard to the other officers, there was no disciplinary element to [the] decision in the Appellant's case. He was returned to his force because the Respondent had lost confidence in his ability to carry out his responsibilities. It seems to me that this was an entirely operational decision similar to the kinds of decision that are made with officers up and down the country every day of the week. Examples are transferring officers from uniform to CID or from traffic to other duties. These, to my mind, are run of the mill management decisions involving deployment of staff or running the force. They are decisions that relate to the individual officer personally and have no public element. They are, if you like, the nuts and bolts of operating a police force, be it the NCS or any other. It is, in my judgment, quite inappropriate for the courts to exercise any supervisory jurisdiction over police operational decisions of this kind. There is, quite simply, no public law element to them. The position is different where, however, disciplinary proceedings have been taken against an officer and the ordinary principles of fairness have been breached."*

60. *Ex Parte Tucker* was considered by the Privy Council in conjoined appeals in *Prime Minister Patrick Manning and Others v Ramjohn and Kissoon* [2011] UKPC 20. There the central question was whether the Prime Minister's decisions - taken in the exercise of powers given under the

Constitution of Trinidad and Tobago to make or revoke appointments to important public offices - were amenable to judicial review.

61. In the light of express provisions in the Judicial Review Act 2000 (**"the 2000 Act")**, as the Privy Council declared at [29], there was no doubt that in the exercise of the respective powers of appointment and revocation of appointment, the Prime Minister was exercising a public duty or performing a public function so as to be required by section 20 of the 2000 Act to do so in accordance with the principles of natural justice or in a fair manner. His decisions were therefore amenable to judicial review.

62. However, in the context of deciding whether or not the Prime Minister had met the requirements of fairness in revoking his own earlier decision to transfer one of the Respondents (Ms Ramjohn) overseas to a prestigious diplomatic post, the Privy Council was invited to find that his decision to revoke was not reviewable by the Court, Counsel for the Prime Minister in that context seeking to rely upon the decision from *Ex Parte Tucker*. While the Court expressed doubt as to the correctness of the decision in *Ex Parte Tucker* on its facts, their Lordships expressed no final conclusion in that regard, and certainly did not doubt the correctness of its analysis for determining the reviewability of a decision. Instead, their Lordships were content to distinguish the cases and resolve the appeals before them by reference to the clear provisions of the 2000 Act (at [34]) (and going on at [35], to state that on the question of fairness, very different considerations arose in their case from those arising in *Ex Parte Tucker)*:

> "*34. On the issue of reviewability, the Board has some doubt as to the correctness of the Court of Appeal's conclusion in Tucker that the DDG's decision was altogether beyond the Court's supervisory jurisdiction. Whether or not, however, that was the correct view there, it cannot properly affect our approach (already expressed at para 29 above) to the application here of section 20 of the 2000 Act. Tucker cannot operate to dilute the effect of the statute*."

63. Accordingly, it appears that *Ex Parte Tucker* stands unscathed for the propositions it adopts for determining whether or not a decision is amenable to judicial review in the absence of clear statutory provision covering the field. Of particular significance here, are the three criteria from *Hopley* set out above at [55]. These were also identified by the learned Chief Justice at [33] of the Judgment and relied upon by him, correctly in our view, for concluding that the decision of the Panel in this case is amenable to judicial review, given that in arriving at their decision, the Panel was exercising statutory powers for the performance of a public function in fulfilment of the 2018 Policy and in doing so, owed a public duty of fairness to the Appellant (as to all other candidates) to ensure that the Interview Process was conducted fairly.

64. Indeed, this is tantamount to that finding of "*sufficient interest*" of which section 64(2) of the Supreme Court Act speaks and which was the necessary prerequisite finding, for the grant of leave to apply for judicial review in this case.

65. Finally, in the trilogy of cases, Scott Baker JA (in his capacity as a Judge of this Court), returned to the issue of reviewability of an administrative decision in *Commissioner of Police v Romeo Allen and Others* [2011] Bda LR 13. In this case, despite promises given to police officers (the

respondents) amounting to legitimate expectations of extension of tenure to retirement on pension, the Commissioner decided to terminate their contracts without apparent cause or reason. The unfairness of treatment was found both at first instance and on appeal, to have been patent and described by Baker JA in the following terms at [16]:

> "*Only the barest of reasons were given for the conclusion of poor work performance and in no case was the respondent given any opportunity of answering the points taken into account against him. There could not be a plainer breach of natural justice. In respect of the other respondent, no reason was given at all for not offering a new contract*."

66. The circumstances were such that in referring to his earlier judgment given on behalf of the English Court of Appeal in *Ex Parte Tucker,* Baker JA had no difficulty in finding at [28] that while police officers are in a different position from other employees and subject to operational decisions with which the Courts would not ordinarily interfere "*Dismissal and other disciplinary punishment is governed by statutory procedures that are amenable to judicial review in the event of any breach of public law principles such as fairness*".

67. The Commissioner's decision, in seeking unfairly and unreasonably to defeat the legitimate expectations of the respondents, had given rise to a "*public law issue*" and was therefore amenable to judicial review. At [30], Baker JA reinforced his decision by reference once more to the three criteria from *Hopley* (above), rather than relying only upon a determination of whether the decision fell on one side or the other of the operational/disciplinary line:

> "*It seems to me that all the criteria are met in the present case. What was involved was not one individual's contract but a group of officers who were promised permanent and pensionable employment at a fixed point in the future provided they obtained the necessary recommendations. The position appears to have been that there was a new policy adopted by the Commissioner, but that it did not take account of the promise made earlier. I have no doubt that the decision not to re-employ the officers on the terms previously promised is one that is amenable to review in public law."*

68. As did the learned Chief Justice in the present case, as explained at [44] above, we adopt a similar approach in determining that the 2018 Promotion Process and the decision of the Panel are amenable to judicial review. We conclude that the proper approach is to consider not only whether there is a "public law' element but also whether the consequence of the Process and the decisions taken affect the interests of the applicant in a way which gives rise to considerations of fairness; whether the Process and the decisions may be regarded as operational or disciplinary in nature being but a guide to an understanding of the consequences.

Discussion on grounds of unfairness advanced on appeal

69. With the legal framework thus stated for the examination of the Appellant's revised grounds of appeal, we now turn to consider them, taken largely in the order in which they were argued. To the extent that these arguments were each addressed in the Judgment, this Court will of course be guided by the settled principle that it may not interfere with the trial judge's findings of fact unless they are shown to be patently wrong.

70. The first revised ground of appeal is that the exclusion of Mr Trott and Mr Payne from the assessment of the In-Basket Exercise was illegal and procedurally unfair. Here Mr Perinchief contended that the 2018 Policy, in paragraph 8.3, mandates that all the assessments must be made by all the Assessors on the Panel and that it was therefore illegal and procedurally unfair to exclude Messrs Trott and Payne from the assessment of the In-Basket Exercise.

71. While paragraph 8 is summarized above at [33(e)], its actual wording in this regard must be set out here. It reads:

> "8.1 *To achieve a greater degree of consistency and ability, a group of assessors will be identified and trained to effectively assess an extended promotion process. Assessors from within the BPS will be of higher rank than the candidate.*
>
> *"8.2 To demonstrate objectivity and to promote transparency, one of the assessors will be a non BPS member*.
>
> "8.3 *Assessment Panels will consist of at least two senior police officers, a Human Resource professional, and one non BPS member in order to provide a rich assessment base*.
>
> "8.4 *Only suitably trained persons may participate in the role of assessor*"

72. ACOP Weeks acknowledged that Messrs Trott and Payne did not participate in the assessment of the In-Basket Exercises, not only that involving the Appellant but for all the candidates. He acknowledged that they were assessed by himself and ACOP Daniels and, in order to accommodate the computerized marking scores applied to the Likert scale scores which was based on there being four assessors, marks identical to those assessed by himself and ACOP Daniels for each candidate, were ascribed to the In Basket Exercises as notionally awarded by Messrs Trott and Payne, with their agreement.

73. ACOP Weeks' explanation for this approach is as recorded at [87] of the Judgment:

> "87. *ACOP Weeks explained to the Court that Mr. Payne and Mr. Trott could not sensibly be asked to assess and mark those components of the exercise which required specialised knowledge of Police operations and procedures. In particular, in relation to the In-Basket Exercise, he explained that as the two most senior operational officers in the Service, it was felt that they [himself and ACOP Daniels] were best placed to mark a test that required the candidates to produce police reports using specific police jargon, standards and language that would not have been familiar to either the HR Manager, Mr. Trott, or the non-BPS member, Mr. Payne*".

74. And at [89], the Chief Justice's acceptance of the explanation is in these terms:

> "*I accept the evidence of ACOP Weeks in relation to why it was not sensible for Mr. Payne and Mr. Trott to assess and participate in awarding the Likert scores for the Application Form and the In-Box Exercise. I also accept the rationale as to why and*

how it was necessary for Mr.Payne and Mr. Trott to enter the same Likert scores as ACOP Weeks and ACOP Daniels to obtain the true overall percentage marks for these two exercises"

75. The explanation was accepted on the basis of the following finding at [90] of the Judgment:

> "90. *It seems to me that the 2018 Promotion Policy, in particular paragraphs 8.1, requires that all the assessments must be made by the Assessors and not by any third party. Clause 8.1 does not require that all members must assess and mark all aspects of all the components of the exercise even if they do not have the expertise to do so".*

76. On the appeal, Mr Perinchief also criticized the Judgment for having failed to take account of paragraphs 10.4 and 13.6 of the 2018 Policy (both also speaking to the make-up and role of the assessment panel) and which he described as "*critical areas of the Policy that are enshrined to ensure fairness and transparency".*

77. In our view ACOP Weeks' explanation makes good practical sense and was one which the learned Chief Justice was entitled to accept given his interpretation of paragraph 8 of the 2018 Policy, an interpretation which we also consider to be unassailable. As regards the exclusion of the two assessors from the assessment of the In-Basket Exercise, we also note with approval, the submission of Mr Doughty, that even if paragraph 8 of the Policy (and paragraphs 10.4 and 13.6 for that matter) are to be ascribed the meaning contended for by Mr Perinchief, such that there is a policy requiring participation at all stages by all four assessors, matters of procedural policy are not law and may be departed from if good reason can be shown - citing *Kambadzi v Secretary of State* [2011] 4 All ER 975 (UKSC). In that case, it was held that the failure, without good reason, to conduct the required number of reviews of Mr Kambadzi's detention set by the Secretary of State's policy to be conducted pending his deportation, was detrimental to the legality of his continued detention. Mr Kambadzi had therefore been unlawfully detained and was entitled to damages to be assessed for his detention during those periods without the required reviews being conducted. However, at [36] Lord Hope, in delivering the lead majority judgment, citing a leading textbook, stated as follows:

> "*Wade and Forsyth Administrative Law (10th edn, 2009) pp 315-316 states that the principle that policy must be consistently applied is not in doubt and that the courts now expect government departments to honour their statements of policy. Policy is not law, so it may be departed from if a good reason can be shown. But it has not been suggested that there was good reason for the failure of the officials of the required seniority to review the detention in this case and to do so in accordance with the prescribed timetable*"

As we have explained, in agreement with the findings in the Judgment, there is no such failing here but instead a patently good and sensible reason for not adhering to the Policy's requirement for all four assessors' involvement in assessing the In-Basket Exercise.

78. Finally in this regard, it is important to emphasize that the approach adopted for the assessment of the In-Basket Exercise was across the board, in common to all candidates and there is no

allegation of a complaint by any other candidate. Indeed, this is hardly surprising because the requirement of paragraph 13.6 of the Policy is not that the Panel of Assessors "grade" the In-Basket Exercise but that they "jointly review" all scores. The same is true, as Mr Doughty helpfully explained in his submissions, of the stage of the Process involving the assessment of Applications, pursuant to paragraph 10.4 of the 2018 Policy.

79. The second revised ground of appeal argued by Mr Perinchief is closely related to the first. Notwithstanding the immediately foregoing findings of fact, it alleges that ACOP Daniels was excluded from the marking of the Appellant's "In-Basket Exercise" and that this too was illegal and a procedural irregularity. There are obvious reasons why this ground too is unsustainable. In the first place it was not a ground relied upon in the Supreme Court. Moreover, in light of ACOP Weeks' unrefuted evidence of ACOP Daniels' participation, it is clearly an unsustainable complaint. There simply is no basis in fact for its acceptance.

80. The third revised ground of appeal is that the exclusion of a BPA observer from the Structured Interview of the Panel process was illegal and procedurally unfair. This complaint was framed rather differently before the Supreme Court where it was alleged that, in breach of Order 20.3, ACOP Weeks, as the chairman of the 2018 Promotion Process, had failed to remind the Appellant that he could request a BPA observer to attend at the Interview stage of the Process.

81. Order 20.3 is expressed in terms as set out above at [32] herein. It clearly places no obligation upon the chairman to ensure the participation of a BPA representative on the Panel. The Appellant's complaint now amounts to a change of tack, one which is not only baseless but also impermissible, in light of the conclusions in the Judgment on his complaint as then framed (at [40] to [42]):

> "40. *DS Bhagwan complains that in breach of Order 20.3, ACOP Weeks failed to remind DS Bhagwan that he could request an observer to attend the interview from the BPA. The allegation by DS Bhagwan is not that he was denied his right to have an observer from the BPA but that he was not reminded of that right by ACOP Weeks and that failure to remind constitutes a breach of Order 20.3 of COSO.*
>
> *41. In considering this allegation, it is relevant to keep in mind that DS Bhagwan was a member of the Working Party which reviewed the amendments to the Policy document which resulted in the 2018 Policy. In the circumstances, it is reasonable to assume that DC Bhagwan was aware of this provision in the Policy. Secondly, the entitlement to have an observer arises from Order 20.3 of COSO 2002 which again DC Bhagwan would have been aware of. Thirdly, in paragraph 16 of this First Affidavit, DC Bhagwan recalls that in 2007 when he participated in the Constable to Sergeant Structured Interview process, Supt. Jackman brought to his attention his legal entitlement as per Order 20.3 of COSO 2002 to have a serving BPA member in an "observer" position during the interview to ensure transparency. Again, this indicates that DC Bhagwan was aware of his entitlement to have an observer at the interview session.*
>
> *42. It seems to me that it is clear from the provision in the COSO 2002 and the 2018 Policy that the burden is upon the applicant to make such a request. Order 20.3*

provides that the COP "will permit a Bermuda Police Association "observer" position at the interview stage" and paragraph 13.8 of the 2018 Promotion Policy provides that "on written application candidates may request that a BPA representative may be present during the Structured Interview." It is clear that these provisions contemplate that it is for the candidate to make this request and there is no obligation upon any of the Panel to advise the applicants of this right. In any event, having regard to the evidence set out above, I am satisfied that DS Bhagwan was aware of this right to have a BPA member as an observer at the Structured Interview. Like all the other candidates who participated in the 2018 Promotion Process, DS Bhagwan elected not to ask for a BPA member present as an observer. In the circumstances, I am satisfied that DS Bhagwan's complaint in this regard is entirely unjustified".

82. The fourth revised ground of appeal (addressed here but described as Revised Ground 3 in Mr Perinchief's written submissions) is that the use of the Likert Scale calculations was illegal and irrational. The Likert Scale is a well-known psychometric tool used simply for assessing responses to standard questions, with a range of scores usually from 1-5, with 1 the weakest and 5 being regarded as the strongest, response. It was therefore difficult to see how its use could be justifiably described as "illegal" or "irrational". When this concern was raised by the Court during the hearing of the appeal, from his response, it became apparent that what Mr Perinchief really sought to criticize, by way of the revised grounds of appeal, was the treatment of the subject by the Chief Justice in the Judgment. These criticisms, although raising four separate points, are combined into one revised ground, and are as elaborated upon by Mr Perinchief at pages 11 to 14 of his written submissions which we have considered but, as they were helpfully summarized by Mr Doughty, we adopt his summary here for the sake of brevity, as follows:

"*Revised Ground #3 – that the Chief Justice erred by:*
3.1 Finding that DS Bhagwan's actual total score at the conclusion of the promotion process was 56.68%;

3.2 Finding that the Likert Scale was an acceptable means of assigning mathematical values to the performance of a candidate seeking promotion;

3.3 Entering "the arena" by producing a spreadsheet that was not before the Court in evidence to aid in his calculations;

3.4 Preferring the evidence of ACOP Weeks in finding that the "In Basket Exercise" was not part of the exam."

83. We will take each of these points briefly in turn, explaining why we do not regard any of them as sustainable.

84. First, the assertion that the Chief Justice made a finding that the Appellant's actual total score at the conclusion of the promotion process was 56.68%, is simply misconceived. The Chief Justice at [85] of the Judgment, simply explained why the arithmetical error mentioned above at [36] and further explained below, meant that the original percentage score of 55.48% should be amended to the corrected percentage score of 56.68% which is shown in the spreadsheet at pages 30-31 of the Judgment.

85. Second, the suggestion that there was a finding that the Likert Scale was an acceptable means of assigning mathematical values to the performance of a candidate is a further misconception. The exercise undertaken by the Chief Justice at [72] to [95] of the Judgment, is a detailed examination of the application of the Likert Scale scoring points for arriving at the percentage scores for each stage of the assessment process. The Chief Justice's understanding of the exercise would also have been informed by ACOP Weeks' evidence that the 2018 Process was not the first time that the Likert Scale was utilized for the assessment of candidates' performance. The evidence was that it was a tried and proven assessment tool which had been used for a number of previous rounds of assessment for promotion, going back to 2012 [see transcript 8 March 2021, at 00:08:42 - :59]. It is against all that background that the Judgment must be taken as it concludes at [95] as follows:

> "*I accept that converting the Likert scale into percentage results is a rough and ready exercise but any lack of precision in this case, as it seems to me, is all in favour of DS Bhagwan… in my judgment, Ds Bhagwan's criticism of the conversion of the Likert scale results into a percentage mark is misplaced and appears to be based upon a misunderstanding of the simple conversion equation used by ACOP Weeks*."

86. Third, the complaint that the Chief Justice erred by "entering into the arena" by mathematically determining the Appellant's score must also be regarded as an unfair mischaracterization of what actually took place during the proceedings. As Mr Doughty reminded by reference to the transcript of the recordings of the proceedings, a mathematical error in the calculations of the percentage scores for the "Personal Responsibility" element of the assessment of the In-Basket Exercise, was pointed out by Mr Perinchief himself during the cross-examination of ACOP Weeks. The spreadsheet recording those calculated scores (along with the scores for all other elements) in relation to the Appellant's assessment had been produced [see page 953 of the record] and was before the Court. It was presented to ACOP Weeks during cross-examination when Mr Perinchief pointed out that although each of the four assessors' scores (including those notionally attributed to Messrs Payne and Trott) was recorded as "2" (out of a possible 5) and so should have added up to 8 (out of a possible 20) in the Likert score column, that column erroneously showed "2". This erroneous reduction of 6 Likert points meant that the overall Likert score should have shown 48, instead of the "42" shown in the spreadsheet. However, because the "In-Basket Exercise" itself carried only 20% of the overall scores for the assessment, the error, could not have materially affected the outcome so as to raise the Appellant's overall score to the minimum 60% required. The error patent as it was, was all the same immediately accepted by ACOP Weeks (see transcript, Monday 8th March 2021 at 00:15:24 – 00:17:36).

87. What then followed was extensive cross-examination about the possible overall impact of the error. ACOP Weeks estimated that it could have changed the overall score perhaps by 1% from 55% to 56% but, without having the ability in Court to run the calculations, could not say with certainty what the outcome should be. It was in that context that the transcript shows the following exchanges between bench and bar (from [00:45:40 – 00:46:33]

> "*[00:45:40]* ***Mr Perinchief****: Not a figure we could rely on as the official score. 56 as the official score and final score for Mr Bhagwan, is it?*

***Mr Weeks** (sic): No, but it certainly still would've been under 60.*
***Mr Perinchief**: In any event, 56, isn't it?*
***Chief Justice Hargun**: [crosstalk] go up a percentage?*
***Mr Perinchief**: ...I hear that, but –*
***Chief Justice Hargun**: We can do a mathematical calculation. It's not difficult.*
***Mr Perinchief**: Because the Excel spreadsheet,*
***Chief Justice Hargun**: No, no, no. If you look at the application, if you look at the form, it'll go up by six points, but that, you're dealing with only a certain percentage, it's not 100%. It's easy. It's possible to work it out.*
***Mr Perinchief**: Yes, and my [crosstalk]*
***Chief Justice Hargun**: [crosstalk] to work it out without a spreadsheet, just sitting here.*
*[00:46:33]; **Mr Doughty**: I already have, my Lord."*

88. The calculations were in fact done (or were adopted by the Court)[2] and resulted in the increase of the overall score by 1.20%, from 55.48% to 56.68% - that which is shown as adopted by the Chief Justice in the spreadsheet reproduced at pages 30 to 31 of the Judgment, with the explanation given at [85]. As also explained at [85] and already mentioned above, the rounding up to 58% was at the insistence of the PSC, purely a matter of formality. This complaint (in revised grounds of appeal 3) that the Chief Justice entered into the arena for determining the Appellant's score is therefore baseless and must be rejected. There was no element of unfairness. The Appellant pointed out an error which the Court quite openly sought to resolve and when resolved showed that his overall score still fell short of the mark. Nothing involved in the conduct of the hearing can properly be said to have affected the outcome of his assessment.

89. Fourth, and finally as regards revised ground 3 of appeal, the Appellant seeks to criticize the finding at [92] of the Judgment that "*the In-Basket Exercise is not an "exam" within the meaning of section 9 of the Policy and is otherwise intended to be an assessment tool which existed outside of section 9 of the Policy*" , contrary to his complaint before the Supreme Court that the In-Box Exercise Papers were not marked by independent assessors as part of the examination, in breach of section 9.6 of the 2018 Policy; and that the In-Basket questions were not written by BPS trained persons (as to which complaints see [91] of the Judgment).

90. In our view, on a plain reading of sections 7 and 9 of the 2018 Policy (further to the summaries above, see pages 336 to 338 of the Record) - let alone the evidence of ACOP Weeks in this regard as an author of the Policy and which the Chief Justice also accepted - the Chief Justice was

[2] A document entitled "Review of calculations on pages 30 and 31" of the Judgment was handed up to the Court by Mr Doughty at the hearing of the appeal. In it, the recalculations are attributed to the Chief Justice himself and are compared with and shown to match the final scores awarded by the assessors following the recognition of the error in the Appellant's final score as discussed above. There is however, in this "Review of Calculations" a single inconsistency noted as between the recalculations attributed to the Chief Justice and those of the assessors but that is explained on the basis that the Chief Justice had ascribed a value of 25% of the overall score to the In-Basket exercise when that value was actually only 20%. The final recalculations attributed to the Chief Justice show the corrected value with his results matching the final results of the assessors for the Appellant for the Exercise; viz: 9.6% and so the final overall score of 56.68% accepted by the assessors as explained by ACOP Weeks and shown also at page 31 of the Judgment.

perfectly entitled to conclude as he did at [92] of the Judgment.

91. The fifth revised ground of appeal is to the effect that failure to apply PDR Policy when assessing the candidates for the 2018 Promotion Process was illegal and procedurally unfair. In this regard the complaint is that the Chief Justice erred by:

    a) failing to find illegality on the part of ACOP Weeks' failure to apply PDR policy while assessing the candidates; and

    b) not taking into account the affidavit evidence of Sergeant Michael Butcher and retired Chief Inspector (now reappointed Constable) Hashim Estwick as to how PDR Policy should have been applied to the 2018 Promotion Process.

92. Having read the affidavits of Sergeant Butcher and Chief Inspector Estwick, we can address this ground of complaint briefly by noting our acceptance of Mr Doughty's helpful submissions summarised as follows:

    - PS Butcher and CI Estwick offered opinion evidence concerning the role of the PDRs and the PDR Policy in the 2018 Promotion Process despite the fact that neither of them was involved in the development of the 2018 Policy and the fact that neither was presented to or qualified by the Court as an expert on the subject;

    - ACOP Weeks, in his second affidavit and in his capacity as author of the 2018 Policy, refuted every claim raised by PS Butcher and CI Estwick, in this regard in their affidavits. The Chief Justice was entitled to accept, as he did, the unrefuted evidence of ACOP Weeks about the limited role to which the PDRs had been relegated in the 2018 Process;

    - Moreover, the Appellant never sought to cross-examine ACOP Weeks on his evidence concerning the role of the PDRs in the 2018 Process. This is perhaps not surprising as on a plain reading of the Policy at paragraphs 5.9 and 10.2 (see pages 335 and 339 of the Record), the explanation of it by ACOP Weeks as taken from the Judgment and set out at [57] above herein, that explanation appears to be correct.

    - For all of those reasons, we find there was no need for the Chief Justice to cite and discuss the evidence of PS Butcher or CI Estwick, on this issue in the Judgment.

93. The sixth and final revised ground of appeal cites the alleged non-attendance of the fifth Respondent Mr Payne at an Assessors' Training Workshop in December 2012. This non-attendance is asserted as having resulted in him being unqualified to assess the 2018 Promotion Process and therefore that his involvement in the Process was illegal and a procedural irregularity which vitiated the Process. And further, that CI Estwick's evidence given some 8 years later in his affidavit to the effect that he did not recall seeing Mr Payne at the said workshop in December 2012, should nonetheless have been accepted by the Chief Justice.

94. This is an argument which we can also address with the brevity it deserves. Although Mr Payne testified and was cross-examined, Mr Doughty submitted, without contradiction, that it was not put to Mr Payne that he had failed to attend the training session in question. In light of the

evidence of both ACOP Weeks and Mr Payne himself to the contrary, the failure to press Mr Payne on this issue, especially if only having regard to CI Estwick's rather vague evidence, is not surprising.

95. In the circumstances, there is no faulting the Chief Justice's treatment of the issue, as appears from [98] to [100] of the Judgment:

> "*98 DS Bhagwan complains that not all the panel members were qualified to competently undertake or administer or understand the subject assessment assignment in part or in its entirety and in particular, that some of them lacked the mandatory IACP training in order to conduct such a promotion entity.*
>
> *99. In the end, this ground of appeal boils down to the allegation against Mr. Payne that he was not qualified to be an Assessor because he did not attend in its entirety December 2012 IACP training standards workshop held from 3 to 5 December 2012 at the BPS Training Center. It is said on behalf of DS Bhagwan, that whilst civilian Assessors Mr. Trott and Mr. Payne feature as selected under the General Orders 48/2012 for this highly specialised and technical workshop billed "Promotion Assessor Training" by the IACP, Mr. Payne is not mentioned anywhere as attending that training session.*
>
> *100. Both ACOP Weeks and Mr. Payne were cross-examined in relation to this issue to explore whether Mr. Payne did or did not attend the IACP training workshop. Both ACOP Weeks and Mr. Payne confirmed under oath that Mr. Payne did indeed attend this workshop in December 2012. Mr. Payne remembers that clearly partly due to the fact that this was around the week when ACOP Weeks' home had been burgled. I have no hesitation in accepting the evidence of ACOP Weeks and Mr. Payne in this regard"*

Summary of conclusions

96. For the reasons discussed above, we find:

i. The issues raised on appeal relating to the Process and the results of the Panel are justiciable by way of judicial review.

ii. While the issue of apparent bias was not pressed as a ground of appeal, we have considered that issue as discussed in the Judgment and regard it as having been addressed appropriately.

iii. None of the six revised grounds of appeal has presented any basis for departing from the findings in the Judgment in relation to the issues raised by them.

iv. The appeal is dismissed accordingly.

v. the parties may present written submissions as to the costs of the appeal to be exchanged and filed in the Court within 14 days of the date of this judgment.

CLARKE P:

97. I agree with the judgment of My Lord. The appeal is therefore dismissed.

BELL JA:

98. I, also, agree.